UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 11

YADKIN VALLEY TELEPHONE MEMBERSHIP CORPORATION[1]

Employer

and Case No. 11-RC-6564

TEAMSTERS LOCAL UNION NO. 61, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO[2]

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Yadkin Valley Telephone Membership Corporation, is a North Carolina corporation with a facility in Yadkinville, North Carolina, where it is engaged in the distribution and sale of telephone services. The Petitioner, Teamsters Local 61, affiliated with the International Brotherhood of Teamsters, AFL-CIO, filed a petition with the National Labor Relations Board (hereinafter Board) under Section 9(c) of the National Labor Relations Act (hereinafter Act) seeking to represent a unit comprised of employees employed by the Employer at its Yadkinville facility, in the following classifications: Construction Tech, Data Service Tech, Combo Tech 1, Combo Tech 2, Central Office Tech 1, Central Office Tech 2, OSP Engineers, Engineering Specialists, Cable Techs, Vehicle Maintenance Technicians, Maintenance and Repair Tech, Plant Warehouse Supply, Plant Center Coordinators, NOC Tech, NOC Specialists,

[1] The Employer's name appears as amended at hearing.
[2] The Petitioner's name appears as amended at hearing.

Video/Internet Coordinator and Operations/Property Specialist.[3] A hearing officer of the Board held a hearing and the parties filed briefs with the undersigned.

There is no dispute between the parties over the scope and composition of the proposed unit. As evidenced at hearing and in the parties' briefs, the sole issue is whether the Employer, a telephone cooperative, is exempt from the Board's jurisdiction as a political subdivision of the State of North Carolina. The Employer contends that it is exempt from the Board's jurisdiction because it is a political subdivision under Section 2(2) of the Act. The Petitioner contends that the Employer is not a political subdivision and thus, not exempt from the Board's jurisdiction.

I have considered the evidence and the arguments presented by the parties on the issue. As discussed below, I have concluded that the Board has jurisdiction over the Employer, as it is not a political subdivision under Section 2(2) of the Act. Accordingly, I have directed an election in the unit described below. To provide a context for my discussion of this issue, I will first provide general information regarding the North Carolina Electrification Authority (hereinafter NCREA), the administrative agency that oversees the Employer. Second, I will provide a detailed account of the Employer's operations, including its relationship with NCREA. Third, I will provide my analysis, including a detailed discussion of the two-part test the Board applies when determining whether an entity is a political subdivision under Section 2(2) of the Act. Finally, I will present my conclusions and findings on the issue presented.

[3] At the hearing the parties agreed to amend the names of certain job classifications listed in the petition and include the classifications of Video/Internet Coordinator and Operations/Property Specialist.

I. NCREA

Chapter 117 of the North Carolina General Statutes (hereinafter "enabling statute") creates NCREA, a state agency that consists of five members appointed by the Governor of North Carolina for four-year terms. N.C. Gen. Stat. §117-1 (1935). Among other things, NCREA is responsible for: (1) ensuring that customers in predominantly rural areas have access to adequate and affordable electric and telephone services, (2) overseeing the application and administration of both electric and telephone membership corporations (hereinafter cooperatives) rules and regulations, (3) receiving and investigating member complaints of the cooperatives, and (4) advising cooperatives regarding recommended changes in rules and regulations. N.C. Gen. Stat. §117-2; http://www.ncrea.net/. In addition, NCREA helps cooperatives process loans for final submission to the Rural Utility Service (hereinafter RUS), a federal agency within the United States Department of Agriculture.[4] N.C. Gen. Stat. §117-2. As the Employer here provides telephone services, the remaining focus will be on telephone cooperatives as opposed to electric cooperatives.

Residents in rural communities throughout the State of North Carolina may file an application with NCREA asserting that they are receiving inadequate telephone services. N.C. Gen. Stat. §117-29. Once an application is on file, NCREA will conduct an investigation of the area to determine whether the residents are in fact receiving inadequate services. Id. If NCREA determines that services are inadequate, they will "make reasonable efforts" to see if other telephone companies in the area are willing to provide greater services to the residents. N.C. Gen. Stat. §117-30. If area telephone companies decline such efforts, residents in the affected area may then form a telephone

[4] The RUS was formerly the Rural Electrification Administration (REA).

cooperative.[5] Nothing in the enabling statute specifically states that the telephone cooperatives formed pursuant to the statute are under the direct control of NCREA.

II. EMPLOYER'S OPERATIONS

The application process described above led to the formation of the Employer in 1950. In this case, the Employer provides telecom and internet services to members in a specified geographical area, covering parts of Yadkin, Davie, Iredell, Alexander, Wilkes and Rowan counties. The geographical coverage area is determined by state regulations and does not coordinate with or mirror any known political subdivision in the State of North Carolina.

To become a member of the telephone cooperative, one must reside in the specified geographical area and pay a one-time membership fee of ten dollars. Members of the Employer include residents, businesses, and public entities, such as fire departments and schools.

The enabling statute provides that upon formation of the telephone cooperative, the applicants must execute and file Articles of Incorporation (hereinafter Articles) with the North Carolina Secretary of State. N.C. Gen. Stat. §117-11. The enabling statute provides a detailed outline of the content and format of the Articles. Id. In this case, although the then-Administrator for NCREA endorsed the Articles filed on behalf of the Employer, there does not appear to be anything in the enabling statute that specifically required this endorsement. However, the current NCREA Administrator testified at

[5] Although there is testimony in the record referring to an "order" issued by NCREA upon completion of its investigation, the statute does not appear to specifically mandate that action. No copy of any order was introduced into evidence by the Employer.

hearing that NCREA must endorse and approve the Articles before the telephone cooperative files the Articles with the state.

The enabling statute further provides that each cooperative must establish a Board of Directors that is responsible for managing corporate affairs, including the formation and amendment of bylaws. N.C. Gen. Stat. §117-13-14. In this case, seven individuals are elected by the membership to serve on the Board of Directors for staggered terms. There is a one-membership vote for each service provided to a household or entity (for example, if a husband residing in the coverage area signs up for one service, the household, including his wife and other voting-age adults, only receives one vote). Thus, there could conceivably be four voting-age adults in a household, but the household as an entity would have only one vote for the directors. Directors must be members of the cooperative and residents within the covered area. It has been the policy of the Employer not to allow its directors to hold dual offices (i.e., serve as directors on "two public boards").[6] Directors can be removed from their position by a vote of the membership. Neither NCREA, the RUS, County Commissioners nor City Councils covered by the geographical service area have any input into the selection of the Employer's directors or creation/amendments to the Employer's bylaws.

Pursuant to the instruction of its legal counsel, the Employer operates meetings of the directors under the "Open Meetings Law," which requires it to post notices regarding meetings and allow members of the public to attend. Meetings are conducted on a monthly basis. An agenda is prepared for the meetings and items are marked identifying

[6] Based on the testimony at hearing, it appears that the dual office issue has been raised on only one occasion back in the 1960's or 1970's.

those matters that will be covered in the public session and those that will be reserved for the executive session.

In addition to conducting open meetings, the Employer allows public access to its documents, with the exception of certain personnel matters and some competitive information. The Employer's comptroller and its attorney each testified at hearing that documents and meetings are open to the public, because the Employer is a public agency, as pronounced in the enabling statute. N.C. Gen. Stat. §117-33.

Telephone rates and services are set by the directors, subject to the provisions of the enabling statute. NCREA does not set rates for the Employer, NCREA merely monitors whether the Employer is following its own rates and service policies. This oversight relationship between NCREA and the Employer differs from private telephone companies. Specifically, a private telephone company is regulated by the North Carolina Utility Commission (hereinafter NCUC), as the agency has the authority to approve or disapprove rates set by the private telephone companies. The Employer is not regulated nor does it have any type of reporting relationship with NCUC.

The Employer's bylaws give directors the authority to appoint officers to conduct business, including a President, Vice-President, Secretary, Treasurer, Assistant Secretary, and Assistant Treasurer. In addition, the directors have the authority to hire and/or fire a general manager who is responsible for the day-to-day operations.[7] The Administrator of NCREA works directly with the general manager regarding member complaints or concerns, and obtaining loans through the RUS. Specifically with regard to complaints, the General Manager of the Employer testified that NCREA will contact him and make

[7] The current NCREA Administrator testified at hearing that though he does not have the direct authority to fire the General Manager, he has the obligation to report misconduct by the Board of Directors to the North Carolina Attorney General's office.

him aware of member complaints. The General Manager will then investigate the complaint and try to resolve the issue to both the member's and NCREA's satisfaction. The General Manager then provides follow-up information to NCREA regarding the final resolution of the matter.

The initial funding source for the Employer was the RUS. However, more recently the Employer has maintained a mixture of funding from both the RUS and private funding through loans from banks. Membership fees constitute a very small percentage of funding. As of today, the Employer is self-sufficient and does not depend on federal, state or local funds. However, there is an outstanding loan balance from the RUS totaling approximately $2 or 3 million, which is scheduled for full payment in approximately 15 to 18 years. Because of the federal loan, the Employer is obligated to submit an annual report to RUS detailing certain financial information. NCREA requests a copy of this report as well. When the loan is paid in full, the Employer will no longer be obligated to report financial information to the RUS, however they will still file the same report with NCREA. The Employer also pays a quarterly regulatory fee with NCREA, which is determined by the number of subscriber line accounts.

Pursuant to the enabling statute, the Employer can sue and be sued and hold and dispose of property (including real and personal, tangible and intangible). N.C. Gen. Stat. §117-18. Unlike other private corporations, the Employer uses State license plates on its vehicles. In addition, the Employer can issue bonds, and it is exempt from both Federal income tax and all State taxes, excluding sales and use tax.[8] N.C. Gen. Stat.

[8] The Employer offered evidence at hearing regarding the State taxation of a State-owned telephone company. Specifically, in Pineville, North Carolina, the telephone company that provides service to the area is owned by the City of Pineville. The Employer pays the same State sales tax as the Pineville telephone company.

§117-21. NCREA can exercise the power of eminent domain for the benefit of the Employer, however, the Employer itself does not have the power of eminent domain. N.C. Gen. Stat. §117-2(7).

Finally, should the Employer elect to dissolve, it must follow the guidelines set out in Section 117-34 of the enabling statute, which requires that the Employer file a certificate of dissolution with the Secretary of State. N.C. Gen. Stat. §117-34. Upon filing the certificate, the Employer is required to satisfy any liabilities, liquidate its assets and pay all outstanding debts. Id. Any assets remaining after the payment of all debts and liabilities pass directly to the State. Id.

III. ANALYSIS

Section 2(2) of the Act provides in pertinent part that, "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include …any State or political subdivision thereof…." The test used to determine whether an entity is exempt as a political subdivision was outlined in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600, at 604-05 (1971). In Hawkins, the Supreme Court articulated a two prong test, holding that for an entity to be exempt as a political subdivision under the Act, it must either: (1) have been created directly by a state, so as to constitute an arm or department of the government; or (2) be administered by individuals who are responsible to public officials or to the general electorate. In addition, the Court in Hawkins County held that, "federal, rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political

subdivision' of the State and therefore not an 'employer' subject to the Act." 400 U.S. at 602-03. I will now provide an analysis of this case pursuant to the Hawkins test.

a. THE EMPLOYER WAS NOT CREATED DIRECTLY BY THE STATE OF NORTH CAROLINA, SO AS TO CONSITUTE AN ARM OR DEPARTMENT OF THE GOVERNMENT

The Employer here asserts that it was created directly by the State of North Carolina, so as to constitute an arm or department of the government. In making its assertion, the Employer relies on the Board's decision in Hinds County Human Resource Agency, 331 NLRB 1404 (2000), in which it was determined that the Hinds County Human Resource Agency (hereinafter HCHRA) was exempt from the Board's jurisdiction as a political subdivision.[9] The Board in Hinds analyzed the first prong of the Hawkins test under a two-step analysis, first evaluating whether the entity was created directly by the state, and then determining whether the entity constituted an arm or department of the state. I will address each of these steps in turn.

In Hinds, the HCHRA was created directly by the Hinds County Board of Supervisors (hereinafter HCBS) pursuant to a Mississippi statute. 331 NLRB at 1404. HCBS was the governing authority over Hines County, Mississippi, and was elected by the general electorate, with each of its five members representing a separate geographical district. Id. at 1404 n. 2. The Board found that the HCHRA was directly created by the State, as it was an entity created by a county government pursuant to an enabling statute. Id.

The present case stands in stark contrast to Hinds, as there is no evidence here demonstrating that the Employer was created by the state through a political subdivision,

[9] As the Board found that the HCHRA was a political subdivision under the first prong of the Hawkins test, it did not address the second prong in the majority decision. Member Truesdale issued a concurring opinion in which he found that the HCHRA would also be exempt under the second prong of the Hawkins test.

such as a local county government. To the contrary, the enabling statute expressly mandates that at least three natural persons will form a cooperative, with no role played by any local government entity in the selection of those persons or in the actual formation of the cooperative. Moreover, no local government officials from any of the counties and cities in which the cooperative's members reside have any input into the Employer's operations. Finally, unlike the enabling statutes in Hinds, nothing in the enabling statutes here provides that cooperatives created pursuant to the statute are under the direct control of the local or state government. The Board's decision in Hinds, therefore, does not provide authority for the proposition that the Employer here was created directly by the State.

More directly on point is a decision of the Board specifically construing the same enabling statute applicable to the Employer here and asserting jurisdiction over a North Carolina electrical membership cooperative. In Randolph Electric Membership Corporation, 145 NLRB 158 (1963), enf'd NLRB v. Randolph Electric Membership Corporation, 343 F.2d 60 (4th Cir.1965), the Board specifically found that, although the NCREA clearly had been directly created by the State, the electrical cooperative itself had not been created directly by the State. 145 NLRB at 164, n. 6. After making that determination, the Board then found that any state pronouncements designating the cooperative as a political subdivision were simply not controlling. 145 NLRB at 161.[10]

[10] The decision of the Fourth Circuit enforcing the Board's Order specifically held that political subdivision status was not established based on any of the following: 1) the language of the statute itself designating the cooperative as a political subdivision; 2) opinions of the North Carolina Attorney General, finding the cooperative to be a political subdivision; 3) tax status under North Carolina law; 4) rulings of the IRS concerning the federal tax status of the cooperative; and 5) the reversion of assets to North Carolina upon dissolution of any cooperative. 343 F.2d at 62- 65.

The Employer on brief makes the broad assertion that "according to the Board, 'directly' does not really mean 'directly' [and] generally, employers established through statutes or ordinances qualify as being created directly by the State. (citing Hinds)." To the contrary, the employer in Hinds was created directly by the local governmental entity. Moreover, the Board appears routinely to apply a strict reading of the term "directly" in concluding that an entity was directly created by the state. In this regard, the Board has found employers not to have been created directly by the state when they were organized or created by private individuals, albeit through procedures prescribed in state legislation, see, e.g., Research Foundation of the City University of New York, 337 NLRB No. 152 (2002) (private individuals created nonprofit corporation under state education statute for the purpose of benefiting state university system; Board finds employer not directly created by state); Woodbury County Community Action Agency, 299 NLRB 554 (1990) (private non-profit corporation had been incorporated by five private individuals under state law; not created directly by any governmental entity nor was any special legislative act or public official required to create it), whereas the Board routinely finds that employers were created directly by the state when a governmental entity or statute directly formed them, see New Britain Institute, 298 NLRB 862 (1990) (entity was formed by a special act of the Connecticut legislature to establish and maintain a library; Board holds that it had been created directly by the State); Madison County Mental Health Center, 253 NLRB 258 (1980) (employer was created directly by a local county government board to fulfill statutory obligation to provide services for mentally ill or developmentally disabled individuals; Board holds that it had been created directly by the

State); Association for the Developmentally Disabled, 231 NLRB 784 (1977) (same); Randolph Electric Membership Corporation, supra.

The Employer here clearly was not created directly by the State of North Carolina or any local county government, but rather, its formation was merely enabled by the statute. Thus, the Employer cannot meet the first-step requirement contained in the first prong of the Hawkins test.

Because I find that the Employer was not created directly by the State, the second step of the analysis, that is, whether the Employer functions as an arm or department of the state, is not triggered. Even assuming arguendo, however, that the Employer had been directly created by the State, the Employer failed to produce sufficient evidence to demonstrate that it functions as an arm or department of the State. I will now address the Employer's arguments in regard to the second step of the analysis under the first prong of Hawkins.

The Employer contends that it is an arm or department of the State because: (1) the enabling statute specifically designates telephone cooperatives as public agencies (to be treated similarly to political subdivisions of the State); (2) various State agencies or actors have concluded that the cooperative is a political subdivision; (3) the Employer uses State license plates on its vehicles; (4) the Employer is exempt from federal and most State taxes; and (5) meetings of the Employer's directors are open to the public.

In regard to the Employer's argument that the State considers the Employer to be a political subdivision, it is settled that state law is not dispositive on this issue, rather, federal law is to apply, and state law is simply to be afforded "careful consideration." Hawkins County, 402 U.S. at 602. Thus, that the State may find the Employer to be a

political subdivision, thereby issuing public license plates, and exempting it from certain taxes, does not in itself require a finding of political subdivision status under the Act. Moreover, it appears that the Board has relied upon this factor only as one of many in finding that an entity functioned as an administrative arm of the state. See, e.g., Hinds, 331 NLRB at 1404-05 (finding the following factors relevant to the conclusion that the employer functioned as an arm of the state: 1) several rulings by state actors or entities finding the employer to be a political subdivision; 2) the presence of significant governmental control over the employer's budget and audit procedures; 3) governmental authority to ratify and approve the employer's bylaws and any subsequent changes, and approve new board members; 4) the employer's exemption from federal and state income taxes; and 5) the participation of employees in the state employees' retirement system).

The Employer also asserts that it is required to conduct its director's meetings pursuant to the North Carolina Open Meetings Law (hereinafter "Open Meetings Law"). Nothing in the record or the enabling statute, however, expressly states that the Employer is required to follow the parameters set out in the Open Meetings Law. The Employer has elected to conduct its meetings under the Open Meetings Law pursuant to the direction of its private legal counsel. [11]

In regard to the Employer's arguments regarding determinations by the Internal Revenue Service, determinations of political subdivision status by the IRS are not

[11] The Employer attaches to its post-hearing brief a document that it appears to be submitting as a late-filed exhibit, a 1996 Opinion of the Office of the Attorney General of North Carolina. This Opinion states that a telephone membership corporation established pursuant to Article 4 of Chapter 117 of the General Statutes is subject to the State's Open Meetings Law, as the corporation is a public body and political subdivision. I take administrative notice of the Opinion, which is reported at 1996 WL 925125 (N.C.A.G.) Again, the manner in which a state chooses to characterize an entity is not controlling on the Board's determination.

binding on the Board's determinations under Section 2(2) of the Act. See NLRB v. Randolph Employer Membership Corporation, 343 F.2d at 64-65.

In contrast to the Employer's arguments, there are several factors that support a finding that the Employer here does not constitute an arm or department of the state. First, the record clearly demonstrates that the Employer has complete control over its budget and operations. Specifically, the General Manager testified that the Employer is currently financially self-sufficient, although it has outstanding loan obligations from both federal and private sources. The General Manager further testified that NCREA has no input into the formation of or amendments to the Employer's bylaws or the selection of its directors.

Second, the Board has recognized that "the authority to exercise eminent domain weighs in favor of finding an entity to be a political subdivision." Hawkins, 402 U.S. at 608. Here, the Employer does not have the direct authority to exercise eminent domain.

Third, the Employer retains its own private legal representation, thus, it is not represented by a state governmental agency.

Finally, the Employer failed to present evidence at the hearing establishing whether its employees enjoy the same employment benefits and are covered under the same labor relations policies as state employees (for example, whether the employees participate in the same health, retirement, grievance and worker's compensation system as state employees). As set out above, the application of state labor relations policies and benefits to an employer's employees has been found to be an indicium of an employer's functioning as an administrative arm of the state. See, e.g., Hinds, 331 NLRB at 1405.

The absence of this telling factor further undercuts any argument that the Employer here functions as an arm of the State of North Carolina.

Based on the foregoing, I find that, even assuming arguendo that the Employer had been created directly by the State of North Carolina, it does not constitute an arm or department of the State.

b. THE EMPLOYER IS NOT RESPONSIBLE TO PUBLIC OFFICIALS OR THE GENERAL ELECTORATE IN ITS SERVICE AREA

1. Responsibility to Public Officials

In determining whether an employer is responsible to public officials, the Board considers whether those individuals directing the employer are appointed by and subject to removal by public officials. Research Foundation of the City University of New York, 337 NLRB No. 152 at 7 (2002). If the employer's board of directors is comprised of individuals who are either directly responsible to or are appointed by public officials, the employer may be exempt from the Board's jurisdiction as a political subdivision. Id.

Here, the Employer's directors are not directly responsible to public officials. Specifically, the directors are not selected, recommended or appointed by NCREA or any other State, county or city officials within the Employer's geographical coverage area. The Administrator for NCREA testified that he does not have the authority to remove the Employer's directors or the general manager. Rather, the membership elects and removes directors, pursuant to the Employer's bylaws. It is these same bylaws that also give the directors the authority to hire and/or remove officers, such as the general

manager.[12] Thus, it is clear that the individuals administering the Employer are not responsible to public officials.

2. Responsibility to the General Electorate

In Concordia Electric, the Board held that an entity will be found to be responsible to the general electorate, "only if the composition of the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type and degree of popular control." Concordia Electric Cooperative, Inc., 315 NLRB 752 at 754 (1994). The facts in Concordia Electric are similar to the present case.[13]

The Employer in Concordia Electric was incorporated pursuant to a Louisiana Electrical Cooperative Law, which provided that only those receiving electrical power from a cooperative and the cooperative's incorporators could be members of the cooperative. Id. at 752. Members of the cooperative could include a combination of natural persons (that is, a husband and wife could hold a joint membership) as well as business entities such as churches and corporations. Id. Members were required to pay a minimal membership fee. Id. The cooperative's bylaws provided that a person, entity or body politic could not hold more than one membership. Id. The cooperative was

[12] At hearing, the General Manager testified that NCREA approved him for the General Manager position. However, the Employer failed to provide any documentary evidence showing that in fact NCREA selected him for hire. As an exhibit, the Employer submitted the General Manager's application for hire, for the proposition that his employment was approved by NCREA. There is nothing on the document, however, showing that NCREA directly approved his hire. I find it significant that the NCREA Administrator did not testify that he had any power to approve for hire or hire a general manager, and that, to the contrary, he affirmatively testified that he had no authority to fire a general manager. I find that the record as a whole fails to establish that NCREA exercises any authority in regard to the hiring or firing of the Employer's managers or employees.

[13] In Concordia, the Board did not analyze the case under the first prong of the Hawkins test, as none of the parties contended or presented evidence that the cooperative was created by the State. Concordia Electric, 315 NLRB at 753.

governed by a Board of Directors, which was elected by the membership, with each member receiving one vote per membership. Id. Members of the Board of Directors were required to be members in good standing, reside in the geographical area and could hold or be a candidate for a paid elective public office. Id.

Generally, the Board of Directors meetings were open to all members. Id. The cooperative periodically filed certain financial information regarding its operations with the RUS (at that time REA) and the Louisiana Public Service Commission (PSC). Id. at 753-754. The filings were generally subject to disclosure by those agencies on public request, but there was no evidence that the Employer's records were otherwise open to the public. Id. at 753.

In Concordia Electric, the cooperative was subject to the regulation of the PSC with respect to rates and services. Id. at 752. The PSC also investigated complaints filed against the cooperative regarding services. Id. Privately owned utilities were regulated by the same commission, but those utilities owned and/or operated by a political subdivision of the State of Louisiana were expressly exempted from the PSC regulatory jurisdiction. Id. The cooperative also reported certain financial information to the RUS because of an outstanding loan. Id. at 753. Once the loan was paid in full, RUS's authority to generally oversee the cooperative would cease. Id. As in the instant case, RUS was not involved in the daily operations of the cooperative. Id.

Louisiana law granted both electrical cooperatives and privately owned utilities the power of eminent domain. Id. at 752. In addition, the cooperative was exempt from Federal income and excise taxation and State income tax, though it was required to pay State sales and property taxes and a regulatory fee to the PSC. Id. at 753.

In Concordia Electric, the employer conceded that there were individuals residing within its service area that were not members of the cooperative. Id. at 753. In addition, the Employer admitted that its membership included entities such as corporations and state agencies, which were not part of the general electorate because they could not vote in state or federal elections. Id. Based on these factors, the Board concluded that the cooperative was not responsible to the general electorate because the membership was not coextensive with the geographic area served. Id. at 753-754. The Board further found that the cooperative's Board of Directors was not elected by the general electorate of its service area, and thus, was not responsible to the general electorate. Id. at 753-755.

As stated earlier, the facts here are similar to those in Concordia Electric.[14] That is, the enabling statute here allowed the formation of the Employer. The bylaws of the Employer are similar to those of the cooperative in Concordia Electric, in that the membership includes not only natural persons who are entitled to vote in local, State or Federal elections, but also entities that cannot vote, such as corporations, schools and fire departments. In addition, as in Concordia Electric, the Employer admits that a single household may have more than one voting age resident, yet only one membership vote for the Directors; thus, the membership does not equate to the general electorate. These two admitted facts are the same factors the Board relied on in Concordia Electric to find that the Employer was not a political subdivision under the second prong of Hawkins County. I find, therefore, that the Employer is not administered by individuals who are responsible to public officials or to the general electorate.

[14] One noted difference between the Employer and the cooperative in Concordia Electric, is that the cooperative had the power of eminent domain, unlike the Employer here.

At the hearing, the parties stipulated that during the past 12-month period, the Employer derived gross revenues in excess of $250,000 from its operations. In addition, the parties stipulated that during that same 12-month period, the Employer purchased and received goods and material valued in excess of $50,000 from points located outside the State of North Carolina. Based on the foregoing, I conclude that the Employer is not a political subdivision under Section 2(2) of the Act, and is subject to Board jurisdiction, as it meets the jurisdictional standards required for a public utility.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time employees classified as Construction Tech, Data Service Tech, Combo Tech 1, Combo Tech 2, Central Office Tech 1, Central Office Tech 2, OSP Engineer, Engineering Specialist, Cable Tech, Vehicle Maintenance Technician, Maintenance and Repair Tech, Plant Warehouse

Supply, Plant Center Coordinator, NOC Tech, NOC Specialist, Video/Internet Coordinator and Operations/Property Specialist employed at the Employer's Yadkinville, North Carolina, facility; but excluding all Service Representatives, office clericals and professional employees, guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Teamsters Local Union No. 61, affiliated with the International Brotherhood of Teamsters, AFL-CIO. The date time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to the Decision.

A. Voting Eligibility

Eligibility to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employee who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for

cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 12367 (1966); NLRB v. Wyman-Gordon Company, 395 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting processes, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 4035 University Parkway, Suite 200, P.O. Box 11467, Winston-Salem, North Carolina, 27116-1467, on or before **Thursday, April 22, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (336) 631-5210. Since the list will

made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. received by the Board in Washington by **Thursday, April 29, 2004.**

Dated at Winston-Salem, North Carolina, on the 15th day of April 2004.

/s/ Willie L. Clark, Jr.

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Willie L. Clark, Jr.
Regional Director
National Labor Relations Board
Region 11
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467